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No. 95-1680

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I.

In responding to the Petition of the General Secretariat of the Organization of American States ("OAS"), the United States defends the violations of its treaty and statutory law obligations in this case by ignoring the text of those obligations. Rather than confronting the treaty and statutory immunity provisions at issue,[1] the Government focuses almost exclusively on prior judicial analyses of bankruptcy law and domestic forfeiture statutes.

This approach sidesteps the central element of the OAS's claim. Whatever the validity of the domestic law cases cited by the United States -- none of which involved the international treaty and statutory provisions at issue here -- the property of the OAS, as that term is understood under the expansive language of the IOIA and the relevant treaties, is immune from confiscation by the United States.

The sweep of the OAS's property immunity is strikingly clear from precisely what the United States refuses to acknowledge: the straightforward and practical language of the IOIA, the OAS Charter, and the Headquarters Agreement. The IOIA states that "[p]roperty and assets of international

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[1] Article 138 of the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394 ("OAS Charter"); Article I, § 7, Article III, § 1, & Article IV, § 2 of the Headquarters Agreement Between the Government of the United States of America and the Organization of American States, May 14, 1992, S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1992) ("Headquarters Agreement"); and the International Organizations Immunities Act, 22 U.S.C. § 288a ("IOIA").

organizations, wherever located and by whomsoever held, shall be immune from search . . . and from confiscation." 22 U.S.C. § 288a(c) (emphasis supplied). Article 138 of the OAS Charter states that the OAS shall "enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes." Those functions necessarily include the ability to hold and transfer funds in bank accounts. The Headquarters Agreement underscores that fact by stating explicitly that "[p]roperty of the Organization shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial, or legislative action" and by defining "property of the Organization" as:

> without limitation, funds and assets belonging to the Organization, by whomsoever held; funds and assets held or administered by the Organization in furtherance of its functions under the Charter, by whomsoever held . . . ; and, in general, all income of the Organization.

Headquarters Agreement, art. IV, § 2 & art. I, § 7 (emphasis supplied).

The Headquarters Agreement reinforces preexisting immunities of the OAS. In transmitting the Headquarters Agreement to the Senate, President Bush explained that "[t]he Agreement in large measure elaborates and codifies the existing arrangements governing the presence of the headquarters of the OAS in the United States." S. Treaty Doc. No. 40, 102d Cong., 2d Sess. III (1992). The President's transmittal message identifies those aspects of the Headquarters Agreement that add to or alter preexisting commitments. Neither the President's message nor the Senate report on the Headquarters Agreement mentions any change to the meaning or scope of the property immunities of the OAS provided for in the IOIA. See S. Treaty Doc. No. 40, 102d

Cong., 2d Sess. (1992); S. Exec. Rep. No. 37, 103d Cong., 2d Sess. (1994). Thus, while to be sure, the Headquarters Agreement came into effect after the confiscation involved in this case (Brief for the United States in Opposition ("Br. Opp.") at 7),[2] the Government does not and could not contend that the Headquarters Agreement's provisions expanded the scope of the long preexisting obligations of the United States with respect to protection of OAS property.

It belies reality to suggest that, in negotiating and ratifying the OAS Charter and the Headquarters Agreement and in enacting the IOIA, the United States did not intend that the immunities provisions of those legal instruments would cover OAS funds held in banks in the United States. The treaties and the IOIA mean what they say. No interpretation of the domestic-law reach of the RICO statute can obviate the plain meaning of relevant immunities provisions. It is not enough, for purposes of defending a confiscation prohibited by treaty, that the confiscation accords with the text of a forfeiture statute. For such a defense to succeed, the statute must specifically override the treaty prohibition, involving a repudiation of international law. (Petition at 14-15.) In this case, the Government does not -- and indeed, given the reaffirmation of OAS property immunities set forth in the Headquarters Agreement, could not -- argue that the 1970 RICO statute[3] overrode the OAS treaty and statutory immunities.

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[2] The Headquarters Agreement was signed in 1992 and was ratified by the United States Senate in 1994. 140 Cong. Rec. S14,475 (daily ed. Oct. 6, 1994).

[3] Organized Crime Control Act of 1970, Pub. L. No. 91-452, Title IX, Racketeer Influenced and Corrupt Organizations, 84 Stat. 922, 941-48 (1970).

II.

The United States also attempts to evade the violations of OAS immunities effected in this case by asserting that the OAS has an opportunity to seek to recover its funds forfeited in the United States "in the global distribution of BCCI's remaining assets." (Br. Opp. at 7 n.3.) Not only does this contention fail to address the fundamental argument that OAS funds held in U.S. bank accounts are immune from forfeiture, but it also is inconsistent with the record.

The record indicates that the OAS has no recourse to the funds available from the global distribution. As explained in the Petition, when the OAS sought to recover its funds from BCCI's Barbados branch, the official Administrator of the branch (having the status of Custodian of the Barbados branch) took the position that the funds were not deposited with BCCI, since the money was not available to the Barbados branch but rather was held captive in Capital Bank in Miami. (Petition at 3.) Based on the record, the United States should have inserted "not" in footnote 3 of its brief: "There is no reason to believe that the position taken by the administrator of the BCCI Barbados branch . . . will [not] preclude petitioner's recovery in the global distribution of BCCI's [non-U.S.] assets." The Government cannot, therefore, avoid the immunities provisions protecting OAS funds on the theory that those funds may be recoverable from a source other than the assets confiscated by the United States.

III.

Even the sole source of law -- domestic forfeiture jurisprudence -- relied on by the Government undermines the Government's position, particularly when taken with the facts of this case (which the Government ignores) and the special treaty and statutory provisions (which it does its best to ignore). The only BCCI asset answerable to the OAS's claim, given the position taken by the Administrator of the Barbados branch, is the account

of the Barbados branch at Capital Bank in Miami. The situation here, where the Government seized all of BCCI's assets in the United States, is analogous to that in United States v. Reckmeyer, 836 F.2d 200 (4th Cir. 1987), where the Government seized the entirety of assets answerable to the claim of a petitioner seeking relief from forfeiture. In Reckmeyer, the court recognized that, where "[i]n practical terms [the defendant's] entire estate ha[d] been forfeited to the government" and the "petitioners' interests necessarily [lay] within that estate," the position of the petitioner seeking relief from forfeiture is the same as if the Government had seized the petitioner's claim itself. Id. at 206. That is the common sense of the matter and common sense is often good law.

The Government questions the Reckmeyer decision as a matter of domestic law (Br. Opp. at 5 n.2), but whether the decision jibes well with the domestic statutes or not, its teachings clearly fit the broader colloquial terms of the treaties and implementing statutes involved here. It is immaterial that the United States did not seize all of BCCI's global assets; it did seize all of BCCI's assets answerable to the OAS's claim.

IV.

In refusing to consider the special immunity status of the OAS as it relates to the forfeiture challenge presented in this case, the court of appeals not only impeached the rights of the OAS, but also set a precedent that threatens, in the United States and worldwide, virtually all other international organizations, and by extension foreign sovereigns as well. Nowhere does the Government deny the broad significance of this precedent.

This Court should not leave undisturbed an opinion that, like that of the court below, fails so abjectly to grapple with the international legal commitments of the United States. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented

for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900).

CONCLUSION

For the reasons stated in the Petition and in this reply brief, certiorari should be granted.

Respectfully submitted,

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